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October 18, 2002

VIA ELECTRONIC FILING

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

Re: Application by SBC Communications Inc. For Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of California; WC Docket No. 02-306

Written *Ex Parte* Presentation by Telscape Communications, Inc.

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, Telscape Communications, Inc. ("Telscape") submits this written *ex parte* presentation in the above-captioned docketed proceeding. The purpose of this presentation is to provide information in advance of an oral *ex parte* presentation to be made to the SBC/California 271 review team on October 23, 2002.

Introduction

Telscape is a Monrovia, California facilities-based competitive local exchange carrier ("CLEC") that offers bundled packages of local, long distance, and enhanced services to residential and small business customers in Southern California. Telscape provides service to its end-users utilizing unbundled local loops ("UNE-L"), the unbundled network element platform ("UNE-P") as well as a negligible number of resale lines. To date, Telscape has built out collocations in 36 ILEC central offices, providing it access to an addressable market of almost 5 million people. Today, Telscape provides service to approximately 50,000 customers. Herein, Telscape describes the problems that it has continued to have in attempting to compete in the

California competitive telecommunications market, and accordingly, how these on-going and pervasive problems preclude a finding by the Commission that Pacific Bell ("Pacific Bell" or "SBC") has satisfied the requirements of the Section 271 checklist.

Indeed, the California Public Utility Commission ("CPUC") itself concluded in Decision 02-09-050 ("D.02-09-050") that Pacific Bell had satisfied only 12 of the 14 Section 271 checklist items, and stated that even those items with which Pacific Bell had complied, were adequate "in only the most technical sense."[1] As the Commission is obviously aware, the CPUC concluded that Pacific Bell had failed to comply with checklist items 11 and 14. Below, Telscape describes in detail how Pacific Bell has also failed comply with checklist items 2 and 5 of the Section 271 checklist, in addition to failing to satisfy the public interest test of Section 271(d)(3).

PacBell Has Failed to Provide Telscape With Accurate Wholesale Bills in Violation of Checklist Item 2

Checklist Item 2 requires that Pacific Bell provide non-discriminatory access to network elements in accordance with section 251(c)(3) and 252(d)(1). In the *Verizon Pennsylvania Order* the Commission concluded that nondiscriminatory access to network elements under checklist Item 2 includes the requirement that a BOC demonstrate that it can produce readable, auditable and accurate wholesale bills.[2] The Commission held:

> Inaccurate or untimely wholesale bills can impede a competitive LEC's ability to compete in many ways. First, a competitive LEC must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections. Second, a competitive LEC must show improper overcharges as current debts on its balance sheet until the charges are resolved, which can jeopardize its ability to attract investment capital. Third, competitive LECs must operate with a diminished capacity to monitor, predict and adjust expenses and prices in response to competition. Fourth, competitive LECs may lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill from an incumbent LEC.

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1 *See Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, R 93-04-003, D.02-09-050 at 252 (Sept. 25, 2002) at 252 ("*California Decision*").

2 *See Verizon Pennsylvania Order,* Memorandum Opinion and Order, 16 FCC Rcd 17419, ¶22-23 (2001). ("*Verizon Pennsylvania Order*").

> Accurate and timely wholesale bills in both retail and BOS BDT format thus represent a crucial component of OSS.[3]

In fact, Telscape has experienced all of the problems identified by the Commission in the *Verizon Pennsylvania Order*. Pacific Bell's inaccurate bills have cost Telscape hundreds of thousands of dollars in personnel resources. Indeed, Telscape has hired a full-time bill auditor to audit SBC's bills (both electronic and paper) and Telscape spends hours each week on the telephone with SBC on weekly billing conference calls. Telscape has found billing errors each and every month that Telscape has done business with SBC. Indeed, SBC has, as a general matter, grossly over-billed Telscape. When Telscape disputes SBC's inaccurate bills, resolution of the disputes taken between six and fourteen months. While the disputes are pending, SBC demands payment for disputed bills period, and continues to issue Telscape bills that are inaccurate as a result of inherent SBC billing system defects. Other billing issues have included:

- UNE-P Deaveraged Loop Costing

  When Telscape began ordering UNE-P lines, SBC charged Telscape "averaged" loop rates, contrary to Telscape's interconnection agreement. Telscape immediately disputed the charges. Only after much delay and SBC confusion was the problem was corroborated; however, it was several more months until SBC finally issued Telscape the billing credit.

- Port-Back Billing

  SBC had maintained a policy to unilaterally submit port-back orders for end-users returning to SBC and had charged Telscape for the disconnect at the fully manual rate instead of the mechanized rate for which the orders were eligible. Telscape raised the issue in the SBC CLEC user forum, at which time SBC finally decided to reverse their policy. SBC represented to the members of the CLEC user forum that they would automatically credit all CLECs for the improperly billed amounts, however in the final release of the documentation SBC changed the language, and credited only those CLECs that were able to quantify the amount.

- Late Charges

  SBC continues to bill Telscape for frivolous late charges, and Telscape has repeatedly asked SBC to remove the improper late charges. However, not only does SBC refuse to address the issue, but SBC continues to allow the late charges to accrue and applies new late charges on the unpaid late charges.

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3 *Verizon Pennsylvania Order*, ¶ 23 (citations omitted).

- Incorrect Non Recurring Charges

  SBC incorrectly billed Telscape a "semi-mechanized" rate ($48.49) for internal migrations from resale or UNE-P to UNE-L instead of the mechanized rate ($18.72) for which these orders are eligible. After Telscape attempted to escalate this issue for a number of months, SBC finally agreed that the migrations were eligible for the mechanized rate. However, to date, SBC has not credited Telscape for the approximately $125,000 in overcharges for these orders.

Obviously, then, Pacific's wholesale billing operations fail to comply with the requirements of checklist item 2. The CPUC's tepid finding that SBC has complied with this checklist item—stating that Pacific had achieved "a fairly substantial state of parity, which seemed to be improving at year's end, and we have incentives in place to help assure Pacific does not backslide from the level of vigilance necessary to assure continuing substantial OSS performance parity for CLECs"[4]—crumbles under even cursory examination of most carriers' day-to-day experience with SBC's billing operations. Accordingly, the Commission should reject Pacific Bell's application for failure to satisfy checklist item 2.

SBC Has Failed to Provide Shared Transport for IntraLATA Toll Calls In Violation of Checklist Item 5

Transport (dedicated or shared) is an unbundled network element that must be provided on a nondiscriminatory basis pursuant to section 251(c)(3).[5] Pursuant to this checklist item, SBC must demonstrate that it provides transport to a competing carrier under terms and conditions that are equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.[6] SBC has failed to comply with this requirement in that, in violation of checklist Item 5, SBC has consistently refused to facilitate Telscape's request to carry UNE-P IntraLATA toll calls using shared transport. Indeed, the Commission directly refuted SBC's assertion that it complies "with the 'shared transport' requirements of the Commission's *UNE Remand Order*"[7] when, on October 9, 2002 the Commission found that SBC "willfully and repeatedly violated" one conditions that the Commission imposed in its order approving the merger application of Ameritech Corp,"[8] which requires SBC to provide CLECs the option of

4 *See California Decision* at 66.

5 *See* 47 U.S.C. § 271(c)(2)(B)(ii) and (v).

6 *Local Competition First Report and Ord*er at ¶ 315; *see also* 47 C.F.R. § 51.313(b).

7 *See* SBC Communications Brief in Support of Application by SBC for Provision of In-Region InterLATA Services in California at 68.

8 *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules,*

using shared transport to route intraLATA toll calls, without restriction, between their end user customers and customers served by SBC.[9] As a result, the Commission issued an NAL finding SBC in violation of the *SBC/Ameritech Merger Order*, and finding SBC apparently liable for a forfeiture in the amount of $6,000,000.

In the *Forfeiture Order*, the Commission explicitly rejected SBC's argument that the paragraph 56 merger conditions does not apply to intraLATA toll traffic, because "SBC's understanding [is] that the Merger Conditions' shared-transport obligation is a purely local one."[10] The Commission concluded that the language of the Act and of the *UNE Remand Order* is "clearly and unambiguously inclusive and does not permit SBC to make exclusions based on the services for which a requesting carrier might use a UNE [including intraLATA toll service]."[11] Clearly, in light of the conclusions set forth in the *Forfeiture Order*, the Commission cannot find that SBC has complied with the requirements of checklist item 5.

PacBell Has Failed to Demonstrate That Grant of Application is In Public Interest, As Required By Section 271(d)(3)

Section 271(d)(3)(c) of the Act directs the Commission to reject a 271 application that fails to demonstrate that it is in the public interest, convenience and necessity."[12] Indeed, it is well settled that the public interest, convenience and necessity standard is to be "so construed as to secure for the public the broad aims of the Communications Act."[13] These broad aims include establishing a "pro-competitive, deregulatory national policy framework designed to . . . open[] all telecommunications markets to competition"[14] and making "available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide . . .

Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) (*"SBC/Ameritech Merger Order"*), *reversed in part on other grounds*, *Association of Communications Enterprises v. Commission*, 235 F.3d 662 (D.C. Cir. 2001).

9 *See In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, NAL/Acct. No. 2002320800004, FRN 0004-3501-24, 0004-335-71, 00005-1937-01, Forfeiture Order (rel. Oct. 9, 2002) (*"Forfeiture Order"*).

10 *Forfeiture Order* at ¶ 15.

11 *Id.* at ¶ 18.

12 47 U.S.C. § 271(d)(3)(c).

13 *NYNEX Corp., and Bell Atlantic Corp.,* 12 FCC Rcd 19985, ¶ 31 (1997) *citing Western Union Division, Commercial Telegrapher's Union, A.F. of L. v. United States,* 87 F. Supp. 324, 335 (D.D.C. 1949), *aff'd* 338 U.S. 864 (1949); *Washington Utilities and Transportation Commission v. Commission,* 513 F.2d 1142, 1147 (9th Cir. 1975); *Commission v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953).

14 H.R. Rep. No. 104-458 at 1; Telecommunications Act of 1996, Pub. L. No. 104-104 (preamble), 110 Stat. 56 (1996).

communication service . . . ."[15] As the Commission has recognized, "[t]he legislative history of the public interest requirement in section 271 indicates that Congress intended the Commission, in evaluating section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."[16] "[T]he public interest standard necessarily encompasses the goal of promoting competition . . . ."[17] As Commission has correctly recognized, "failure to create competition among local service providers necessarily means a lack of competition to provide interstate switched access," because "interstate switched access is generally provided over the same 'bottleneck' facilities and by the same providers as provide local exchange and exchange access service . . . ."[18] Accordingly, "the public interest analysis necessarily includes a review of the nature and extent of local competition, as exemplified by the fact that Section 271 of the Act specifically applies the public interest standard to, inter alia, a review of local market conditions."[19]

Accordingly, the public interest standard of Section 271 requires the Commission to look beyond the mere technical compliance with the fourteen point checklist (which, incidentally, the CPUC found Pacific Bell had failed to achieve) and examine whether competition has actually taken root in a state. In California, it is clear that it has not, and this is in large part a result of SBC's aggressive win-back campaign, of which Telscape has been a target. Specifically, Pacific Bell's aggressive, and indeed, anticompetitive, marketing and win-back efforts have targeted Telscape's newly-acquired customers. Telscape has documented numerous instances in which customers are taken by Pacific Bell without any prior notice to Telscape, and in some instances, with no notice at all, resulting in situations where Telscape continues billing the customer even after they have migrated away. Furthermore, Pacific Bell has begun a campaign pursuant to which end-users that disconnect from Pacific Bell are sent a refund check by Pacific Bell. However, where end-users change their service to Telscape, the end users are sent an exit letter from Pacific Bell suggesting they were slammed, and inviting them to call and telling the end user to ask Pacific Bell about special offers to return, and an extra quick return if they were slammed. Telscape submits that these on-going activities not only require that the Commission reject SBC's application on the grounds that it fails to satisfy the

15 47 U.S.C. § 151 (1997). These goals date to the original Communications Act of 1934. *See* H.R. Rep. No. 1918, 73d Cong., 2d Sess. 1 (1934).

16 *Ameritech Michigan Order* at ¶ 385, *citing* S. Rep. No. 23, 104th Cong., 1st Sess. 44 (1995) ("The public interest, convenience and necessity standard is the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in this bill.").

17 *NYNEX Corp., and Bell Atlantic Corp.,* 12 FCC Rcd 19985, ¶ 31 (1997).

18 *Id.*

19 *Id.* at ¶35.

public interest test of Section 271, but the Commission should also find that SBC has violated Section 222 of the Act.

In 1996, Congress amended the Act to include section 222(b), which limits a telecommunication carrier's use of proprietary information in its marketing activities. Specifically, section 222(b) prohibits a telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service from using such information for its own marketing efforts.[20] Section 222(b) restricts carriers' use of such proprietary information to the provision of telecommunications service to other carriers.[21] In addition, the Commission has determined that carrier change information is carrier proprietary information subject to Section 222.[22] The Commission has interpreted section 222(b) to prohibit carriers from using carrier change information to attempt to change or unduly influence a subscriber's decision to switch to carriers,[23] and the Commission has concluded that carriers may not use customer proprietary network information ("CPNI") or carrier proprietary information to retain existing customers, where the carrier obtained notice of a customer's imminent cancellation of service through the provision of wholesale carrier-to-carrier service.[24]

Despite the mandates contained in the Act and the Commission's orders adopted there under, Pacific Bell continues to engage in anti-competitive marketing activities directed against Telscape, using carrier proprietary information. Pacific Bell's improper marketing

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20 47 U.S.C. § 222(b).

21 *Id.*

22 *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers,* Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-129, Commission 98-334, 14 FCC Rcd 1508, 1572, ¶106 (1998) ("*Slamming Order*").

23 *Id.*

24 *See In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petition for Forbearance, CC Docket Nos. 96-115 and 96-149, 14 FCC Rcd 14409, 14449 at ¶ 77 (1999) ("*CPNI Order on Reconsideration*"); *see also In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket Nos. 96-115 and 96-149, Commission 98-27, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, (1998) ("*CPNI Order*"). We note that the United States Court of Appeals for the 10th Circuit, US WEST v. Commission, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (Jun. 5, 2000) (No. 99-1427) (US WEST v. Commission), issued an opinion vacating a portion of the Commission's 1998 *CPNI Order and the Reconsideration Order. See also In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* Clarification Order and Second Further Notice of Proposed Rulemaking, CC Docket No 96-115, Commission 01-247, at ¶¶ 1-8 (rel. September 7, 2001) (*CPNI Clarification Order*).

practices are targeted at newly contracted Telscape customers who have not yet ceased receiving Pacific Bell or another carrier's service and commenced receiving service from Telscape.

Telscape submits that Pacific Bell's win-back activities are contrary to the requirements of section 222(b) of the Act and the Commission's *Slamming* and *CPNI Remand Orders*. SBC has a track record of engaging in such behavior. Accordingly, other state commission's, including most notably, Texas, have restricted, or are considering restricting the ability of SBC to engage in win-back activities. Indeed, the Texas Commission is on the cusp of adopting rules which would prohibit incumbents in the state of Texas from making retention and win-back offers directly to soon-to-be-former customers and former customers for a specified number days after the customer decides to change carriers.[25] Similarly, the Ohio Public Utilities Commission adopted an order preventing SBC Ameritech from engaging in win back activities,[26] as did the Illinois Commerce Commission.[27] As these cases show, SBC has clearly engaged in a demonstrable pattern of anticompetitive behavior.

The size and scale of SBC puts all competitive carriers at a disadvantage when it comes to marketing and customer win-back efforts. With SBC/PacBell controlling 94% of the phone lines in their California region, a 2% gain of market share would equate to a 30% reduction in CLEC market share. This would also mean that if SBC earmarked 2% of revenue for win-back efforts, SBC would have a war chest that no competitive carrier could match, putting the CLEC community at a significant disadvantage. There is evidence that this is exactly what is this happening. Therefore, Telscape has urged the California Commission to immediately open a rulemaking to address the specific and pervasive problem of Pacific Bell's anticompetitive win-back activities, which, unless addressed by the Commission now, will continue to leave California's telecommunications consumers with little or no competitive choice.

The Commission is now faced with a record which demonstrates a pattern of SBC impeding competitors through pervasive billing costs, raising CLEC costs by refusing to provision shared transport, in violation of the Act and the conditions governing SBC's merger with Ameritech, and engaging in anticompetitive win back activities. At the end of the day, the Commission must conclude that it cannot grant SBC's 271 application on the grounds that it has

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25 *See Rulemaking to Amend R. § 26.226 to Address Winback/Retention Offers by Chapter 58 Electing Companies Project,* Texas Public Utilities Commission Project 25784. The Texas Commission voted last week to publish the proposed rule, which triggers a 30-day comment cycle. Replies will be due 45 days after the initial comment deadline, and staff has proposed holding a Dec. 4 hearing on the matter.

26 *See In the Matter of the Complaint of CoreComm Newco, Inc., v. Ameritech Ohio,* Case No. 02-579-TP-CSS, Public Utilities Commission of Ohio (April 11, 2002).

27 *See Z-Tel Communications, Inc. v. Illinois Bell Tel. Company,* Case 02-0160, Order, Illinois Commerce Commission (May 8, 2002).

failed to comply with at least four of the checklist items, as well as the public interest standard of the Act, and therefore should be denied.

Respectfully submitted,

Ross A. Buntrock

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